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No. 90-1688

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In The Supreme Court Of The United States

OCTOBER TERM, 1990

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY and POTOMAC GREENS ASSOCIATES PARTNERSHIP,
Petitioners,

v.

DAINGERFILED ISLAND PROTECTIVE SOCIETY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Richmond, Fredericksburg and Potomac Railroad Company ("RF & P") and Potomac Greens Associates Partnership ("Potomac Greens")[1] respectfully submit this reply to the brief in opposition submitted by respondents Daingerfield Island Protective Society, Kenneth Williams,

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[1]RF & P and Potomac Greens are referred to collectively as the Intervenors.

Ellen Pickering, Jean Caldwell, Save the George Washington Parkway and Northwest Citizens Association (collectively, "DIPS").

DIPS ignores that the Court of Appeals based its reversal of the District Court's laches ruling not on the degree of prejudice the Intervenors have incurred, but rather on the factually-flawed premise that "the damage that plaintiffs sought to prevent . . . has not begun to occur." *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 40 (D.C. Cir. 1990). Because the Court of Appeals improperly refused to apply the doctrine of laches, thereby encouraging citizen groups to attack Federal actions long considered final, Intervenors pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the District of Columbia Circuit.

THE DEGREE OF CONSTRUCTION ON THE POTOMAC GREENS SITE IS IRRELEVANT TO THE PROPER APPLICATION OF THE LACHES DOCTRINE

DIPS contends that the Court of Appeals did not recognize the prejudice to which the Intervenors have been subjected as a result of DIPS' delay. Brief in Opposition at 4. To the contrary, the Court of Appeals commented upon the prejudice to the Intervenors and then ignored it, stating, "We reverse the district court's laches ruling for a different reason . . . . The [district] court did not consider the environmental *benefit* if the Exchange Agreement were voided and the Potomac Greens development blocked." 920 F.2d at 38-40 (emphasis in original). Focusing on prospective benefit to DIPS -- not demonstrated prejudice to the Inter-

venors, the Court of Appeals improperly found that the appropriate inquiry in determining whether laches bars a plaintiff's dilatory claims is whether the harm the plaintiff seeks to prevent has already occurred. *See* 920 F.2d at 40. The Court of Appeals then compounded its error by finding that because "no construction has begun on the interchange or on the Potomac Greens complex; the damage that plaintiffs sought to prevent thus has not begun to occur." 920 F.2d at 40.

Even if DIPS had filed a timely complaint, the only actions it could have challenged would have been those of the Government. The only governmental action to which laches pertains is the National Park Service's ("NPS") granting of access rights to the Intervenors in 1981.[2] *See* 920 F.2d at 33. These rights irrevocably vested in 1971 when RF & P's predecessor in interest deeded the remainder of Dyke's Marsh to the United States, pursuant to the 1970 Exchange Agreement.

In *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973), on which the Intervenors' petition is based in large part, and which DIPS has chosen not to address, the issue was whether the National Environmental Policy Act ("NEPA") should be applied retroactively to Federal action which began prior to its enactment, but which was amended thereafter. The court did not find that the pertinent inquiry is whether construction has commenced, but rather, "what agency decisions are yet to be made, and what decisions, although already made, remain open to revision." 477 F.2d at 890.

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[2]The District Court's laches ruling did not pertain to the Government's approval of the interchange design, which will be subject to review on remand.

Here, the Court of Appeals failed to acknowledge that it is NPS' deeding of easement rights to RF & P in 1981 -- not the subsequent construction by a private party -- that plaintiffs belatedly seek to prevent. Nonetheless the Court of Appeals reversed the District Court's laches ruling, basing its holding expressly on the lack of construction on the site.

THE FEDERAL COURT SYSTEM WILL BE PARALYZED IF THE GOVERNMENT'S ACTIONS REMAIN OPEN TO ATTACK FOREVER

DIPS notes that rescission of governmental action is a traditional equitable remedy granted by the Federal courts. Brief in Opposition at 9 (citing *Pan-American Petroleum & Transport Co. v. United States*, 273 U.S. 456 (1927)).[3] Rescission is a "traditional equitable remedy," and therefore, it is necessarily subject to traditional equitable defenses such as laches. The issue is not whether DIPS could have challenged the land exchange had it proceeded in a timely manner, but rather whether its dilatory conduct resulting in undue prejudice to the Intervenors renders DIPS' complaint barred.

The "logical result" of DIPS' argument is that no matter how lengthy the delay or how great the prejudice, Federal actions remain open to revision forever. It is this result that RF&P requests this Court to prevent. If every completed Federal action which, if aborted, may

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[3] In *Pan-American Petroleum*, the Government was permitted to rescind leases and contracts procured by corruption and fraud. Laches was not an issue.

result in potential environmental benefit, remains open to revision indefinitely, the Federal court system will be paralyzed.

CONCLUSION

For these reasons and those contained in its Petition, the Intervenors respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in order that the decision of that Court regarding laches may be reversed.

Respectfully submitted,

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